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A Survey of Important Decisions of the Minnesota Supreme Court: 1994-1995: Torts

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X. TORTS

A. *Failure To Give Written Notice Precludes a Dram Shop Claim*

In *Wallin v. Letourneau*,[1] the Minnesota Supreme Court held that the licensee of a liquor establishment was not liable under Minnesota Statutes section 340A.802, subdivision 1, (Civil Damages Act)[2] because claimants did not substantially comply with the written-notice requirement.[3] The plaintiff failed to give written notice, and the defendant did not have actual notice of the claim.[4]

Arlene and Michael Wallin sued Scott Letourneau[5] and Leaders' Enterprises Inc. (Leaders), a liquor licensee, as a result of severe injuries sustained by Arlene in an alcohol-related motor vehicle accident.[6] The Wallins alleged that the Hitchin' Post Bar served Letourneau an alcoholic beverage while he was obviously intoxicated and was therefore responsible for injuries the Wallins sustained in the accident.[7]

The Wallins' attorney sent a certified notice-of-injury letter[8] with the required statutory notice of Wallins' injury to The Hitchin' Post Bar instead of to Leaders.[9] The return receipt for the letter was signed by a bartender, not an officer or authorized agent of Leaders. As a result, no officer or authorized agent of Leaders had received the letter.[10]

The trial court granted summary judgment in favor of Leaders' on the grounds that the Wallins' failed to give Leaders written notice of their damage claim as required by Minnesota

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1. 534 N.W.2d 712 (Minn. 1995).
2. *See id.* at 713.
3. *Id.* at 714.
4. *Id.* at 715.
5. All claims against Letourneau were settled prior to trial. *Id.* at 713 n.1.
6. *Id.* at 713.
7. *Id.*
8. *Id.* at 714. The district court found that the letter contained sufficient facts, if read, to reasonably put Leaders' Enterprises on notice of a possible claim and that no other notice was sent. *Id.* at 714 n.4.
9. *Id.* at 714.
10. *Id.*

Statutes section 340A.802 (Civil Damages Act).[11] In the alternative, the court found that the Wallins also failed to show by clear and convincing evidence that Leaders had actual notice of their damage claim.[12] The Minnesota Court of Appeals reversed recognizing that the Wallins did not strictly comply with the written-notice requirement of the statute, but had complied substantially with its requirements.[13]

The Minnesota Supreme Court reinstated the trial court's decision.[14] First, the court noted that the statute required a party to give written notice to the liquor establishment within 120 days of the creation of the attorney-client relationship.[15] To satisfy this, the Wallins were required to serve a notice-of-injury letter upon a registered agent of Leaders, an officer of Leaders, or the Secretary of State.[16] Because the Wallins did not serve notice upon any of those people, they did not satisfy the statute.[17]

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11. *Id.* at 713 n.2 (quoting MINN. STAT. § 340A.802 (1992)). Minnesota Statutes § 340A.802 provides in relevant part:

> Subdivision 1. Notice of Injury.
> A person who claims damages and a person or insurer who claims contribution or indemnity from a licensed retailer of alcoholic beverages or municipal liquor store for or because of an injury within the scope of section 340A.801 must give a written notice to the licensee or municipality stating: (1) the time and date when and person to whom alcoholic beverages were sold or bartered; (2) the name and address of the person or persons who were injured or whose property was damaged; and (3) the approximate time and date, and the place where the injury to person or property occurred . . . . An error or omission in the notice does not void the notice's effect if the notice is otherwise valid unless the error or omission is of a substantially material nature.
> Subd. 2. Limitations; content.
> In the case of a claim for damages, the notice must be served by the claimant's attorney within 120 days of the date of entering an attorney-client relationship with the person in regard to the claim . . . . No action for damages or for contribution or indemnity may be maintained unless the notice has been given . . . . Actual notice of sufficient facts reasonably to put the licensee or governing body of the municipality on notice of a possible claim complies with the notice requirement.

MINN. STAT. § 340A.802 (1992).

In 1993, Minnesota Statutes § 340A.802, subdivision 2, was amended to require the claimant's attorney to provide the licensee with notice within 240 days after commencement of the attorney-client relationship. Act of May 24, 1993, ch. 347, § 22, 1993 Minnesota Laws 2450, 2466; *see Wallin*, 534 N.W.2d at 713-14 n.2. at 713-14 n.2.

12. *Wallin*, 534 N.W.2d at 714.
13. *Id.* (citing Wallin v. Letourneau, 524 N.W.2d 275,278 (Minn. Ct. App. 1994)).
14. *Id.*
15. *Id.* at 715.
16. *Id.*
17. *Id.*

Second, for the Wallins to have substantially complied, they would have had to deliver notice to someone "reasonably likely to give the notice to Leaders's Enterprises at the next opportunity."[18] Because there was no showing that the notice was delivered to such a person, the supreme court held that the Wallins had not substantially complied with the statute.[19]

Third, the court rejected the argument that Leaders had actual notice of the claim. The Wallins argued that the bartender not only accepted and signed for the letter, but had taken similar action in a previous unrelated matter.[20] Thus, the Wallins argued that it could be inferred that the bartender acted similarly on this occasion.[21] The court, however, noted that the bartender testified in a deposition that he did not remember what he did with the letter.[22] Therefore, the court held that it cannot be inferred that Leaders received the notice or had actual notice.[23]

B. *Minnesota Statutes Section 466.03 Exempts Park and Recreation Areas from Liability*

In general, municipalities are liable for their torts.[24] Yet in *Johnson v. Washington County*,[25] the Minnesota Supreme Court held that Washington County was immune from liability pursuant to Minnesota Statutes section 466.03, subdivision 6e, for the wrongful death of Brandon Johnson.[26] The court held that the county was immune because its operation of an artificially-created swimming pond provided it with limited immunity.[27]

The father of seven-year-old Brandon Maurice Johnson brought a wrongful death claim against South Washington County School District and Washington County.[28] Brandon's death occurred after drowning in the Lake Elmo Park Reserve

18. *Id.*
19. *Id.*
20. *Id.* at 715-16. On one other occasion the bartender accepted and signed for the notice and placed the letter in his supervisor's desk. *Id.*
21. *See id.* at 716.
22. *Id.*
23. *Id.*
24. MINN. STAT. § 466.02 (1994).
25. 518 N.W.2d 594 (Minn. 1994).
26. *Id.* at 596.
27. *Id.* at 599-600.
28. *Id.* at 597.

while on a school field trip.[29] The Reserve Pool was an artificially-created swimming pond consisting of a sloping sand bottom that ranged from very shallow to six feet deep. The water was murky one foot below the surface and the pool had no depth markers.[30] The school trip was planned and supervised by four school district employees.[31] A Washington County district court found the school district and the county liable for negligent operation and supervision.[32] The jury apportioned liability at forty percent for the school district and sixty percent for the county, with damages of $1,007,857.84.[33] The county argued that it was immune from liability and if it were liable, Minnesota Statutes section 466.04 limited its damages to $200,000.[34] The district court refused to grant immunity because the county had created a duty to protect those swimming in the Reserve Pool when it constructed an artificial swimming pool and hired lifeguards.[35] The court, however, did limit the county's liability to $200,000.[36]

The Minnesota Court of Appeals reversed in part, holding the county immune from liability.[37] The court of appeals relied on Minnesota Statutes section 466.03, subdivision 6e,[38] which provides a limited exception for park and recreation areas.[39] The Minnesota Supreme Court agreed with the court of appeals that the Reserve Park, including the artificially-created swimming

29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 598.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* (citing Johnson v. Washington County, 506 N.W.2d 632, 637 (Minn. Ct. App. 1993)).
38. Minnesota Statutes § 499.03, subdivision 6e provides immunity for municipalities from the following:

> [a]ny claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, . . . or from any claim based on the clearing of land, removing of refuse, and creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of park and recreational property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

MINN. STAT. § 466.03, subd. 6e (1992).
39. *Johnson*, 518 N.W.2d at 598.

pond, was property intended or permitted to be used as a park for recreation.[40] The county was, therefore, immune pursuant to Minnesota Statutes section 466.03, subdivision 6e from the wrongful death claim unless its conduct "would entitle a trespasser to damages against a private person."[41]

To decide if a trespasser could recover, the court first decided which trespasser standard applied. The court decided that the general standard found in section 335 of the Restatement (Second) of Torts applied.[42] This standard provides that if a possessor of land knows trespassers constantly intrude, he or she is liable for harm caused by an artificial condition if certain requirements are met.[43] First, the condition must be one the possessor has created or maintains, is likely to cause death or serious bodily injury, and is of such a nature that trespassers will not discover it.[44] Second, the possessor must have failed to exercise reasonable care to warn trespassers of the condition and risk.[45]

Applying this standard, the supreme court held that a trespasser could not have recovered. The key factor was that the pool, although artificially created, duplicated nature.[46] Thus, the pool was not an artificial condition.[47] In addition, even if it were an artificial condition, there were no hidden dangers.[48] In general, the court noted that possessors of land are not ordinarily liable for injuries occurring in ordinary, natural, or artificial bodies of water free from traps or concealments.[49] The pool had a gradually-sloped bottom with no drop-offs or unusual currents, so the court held that the county was immune from liability.[50]

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40. *Id.*
41. *Id.* at 599.
42. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 335 (1965)).
43. *See Johnson*, 518 N.W.2d at 599 (quoting RESTATEMENT (SECOND) OF TORTS § 335 (1965)).
44. *Id.*
45. *Id.*
46. *Id.* at 599-600.
47. *Id.*
48. *Id.* at 600.
49. *Id.*
50. *Id.*

C. *Discretionary Function Immunity–Policy-making Conduct involving Social, Political or Economic Considerations*

In *Waste Recovery Cooperative v. County of Hennepin*,[51] the Minnesota Supreme Court held that neither the common-law doctrine of official immunity, nor the statutory discretionary function immunity protected the county from liability. The county was sued for damages caused by an employee's erroneous conclusion, based on his professional judgment, that telephone books collected at depositories for recycling were "waste."[52]

In 1990, the plaintiff, Waste Recovery Cooperative (WRC), agreed with U.S. West to collect all of U.S. West's outdated, surplus and defective phone books for recycling.[53] U.S. West customers were encouraged to deposit their old phone books in containers provided at Target stores, where WRC would collect them.[54] When Thomas Heenan, an employee of Hennepin's Department of Environmental Management, learned of WRC's recycling plan to convert the phone books to fuel, he informed WRC that the books, in accordance with Ordinance 12, were "waste." Consequently, the books were subject to county waste designation requirements, because burning them would not constitute recycling under Minnesota law.[55] Heenan ordered WRC to stop removing phone books from the county and to return those already removed to the county incinerator by February 28, 1991, or make arrangements acceptable to Hennepin County for proper recycling of the phone books by the same date.[56] Hennepin informed WRC that they could process the books for use as worm bedding and packing material, but not fuel.[57] Subsequently, WRC brought suit for claims under state common law and the federal constitution seeking a temporary restraining order and damages.[58]

The district court issued a declaratory judgment ruling that

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51. 517 N.W.2d 329 (Minn. 1994).
52. *Id.* at 330-31.
53. *Id.* at 330. Testimony from Jeffrey Goodman, CEO of WRC, revealed that WRC had planned to convert the phone books to fuel pellets and to shred them for use as worm bedding and packing material. *Id.* at 330 n.4.
54. *Id.* at 330.
55. *Id.*
56. *Id.* at 330-31.
57. *Id.* at 331.
58. *Id.*

pursuant to Minnesota Statutes section 115A.03, subdivision 34, the phone books were not waste and therefore not subject to Ordinance 12.[59] The district court reasoned that because the phone books were not discarded as refuse, they did not come within the definition of "solid waste" as defined by Minnesota Statutes section 116.06, subdivision 10.[60] The district court further added that the phone books were exempted from Ordinance 12 under Minnesota Statutes section 115A.83(1), because they were materials that were separated from solid waste and "recovered for reuse in their original form or for use in manufacturing processes."[61] The Minnesota Court of Appeals affirmed.[62]

In July 1992, WRC petitioned the district court for damages.[63] In response, Hennepin County claimed governmental immunity, which the district court rejected.[64] On appeal, the Minnesota Court of Appeals held that Hennepin was entitled to qualified immunity on WRC's federal claim and was also protected by discretionary function immunity on the state law claims.[65]

The Minnesota Supreme Court granted review solely to consider whether *Nusbaum v. County of Blue Earth*[66] required reversing the court of appeals' decision with regard to the claim of discretionary function immunity.[67] Under *Nusbaum*, the crucial question is whether the conduct involved a weighing of

59. *Id.*

60. *Id.* Minnesota Statutes § 116.06, subdivision 10 (1990) defined "solid waste" to include "discarded waste materials." The district court found the phone books had been recovered for reuse, not discarded. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. 422 N.W.2d 713 (Minn. 1988). In *Nusbaum*, the court held that the critical inquiry in the discretionary function immunity determination is whether the challenged governmental conduct involved a balancing of policy objectives. *Id.* at 722. The court also stated that governmental conduct is protected only where the state produces evidence that the conduct was of a policy-making nature involving social, political, or economic considerations. *Id.* at 720. Discretionary function immunity does not extend to the exercise of professional or scientific judgment where such judgment does not involve the balancing of policy objectives. *Id.* at 722.

67. *Waste Recovery Coop.*, 517 N.W.2d at 331.

policy objectives.[68]

The court held that Hennepin was not entitled to discretionary immunity on the state law claims, and Hennepin employees were not entitled to official immunity for the performance of ministerial duties.[69] The court explained that the decision to consider the phone books "waste" did not involve any balancing of policy considerations and therefore was not protected by discretionary immunity.[70] The court stated that challenging the decision that the books were "waste" did not challenge waste management policy or the balance between competing waste management programs of recycling and waste designation.[71]

The county also argued that Heenan's determination was covered by official immunity, and that Hennepin County was thus vicariously immune.[72] The doctrine of official immunity protects public officials from liability for duties that involve the exercise of judgment or discretion.[73] The court held that it was "clear" that the doctrine did not apply to Heenan, and thus the county was not vicariously immune.[74]

D. *First Right-of-Refusal Statute Prohibits Prearranged Sales to Third Parties*

The family farm foreclosure statute, found in Minnesota Statutes section 500.24, protects family farmers whose land has been foreclosed or similarly forfeited to creditors.[75] The statute enables family farmers to exercise a right of first refusal to repurchase the land when the foreclosing agency attempts to sell it.[76] In *Kjesbo v. Ricks*,[77] the Minnesota Supreme Court considered whether the manner in which the defendants (Ricks and Daniels) had exercised Valerie Ricks' right of first refusal constituted wrongful interference with the plaintiff's (Kjesbo) contract to purchase the farm from Metropolitan Life Insurance

68. *Nusbaum*, 422 N.W.2d at 722 n.5; *see also Waste Recovery Coop.*, 517 N.W.2d at 332.
69. *Waste Recovery Coop.*, 517 N.W.2d at 333.
70. *Id.* at 332.
71. *Id.*
72. *Id.* at 333.
73. *Id.*
74. *Id.*
75. *See* MINN. STAT. § 500.24 (1994).
76. MINN. STAT. § 500.24, subd. 6(a) (1994).
77. 517 N.W.2d 585 (Minn. 1994).

Company (Met Life).[78] The court affirmed the trial court ruling granting summary judgment for Kjesbo on his tortious interference claim and awarding specific performance relief.[79]

Met Life had acquired the deed to the Ricks' farmland in lieu of foreclosure.[80] Kjesbo, who was then leasing the farmland, offered Met Life $165,000 for the property, which was accepted subject to Valerie Ricks' statutory right of first of refusal.[81] The Ricks, unable to meet Kjesbo's terms, sought the assistance of Douglas Daniels to finance the purchase. Daniels paid the financed amount directly to Met Life. Once the closing was completed, Daniels owned half of the property.[82]

Kjesbo sued Daniels, Met Life, and the Ricks for violation of the right-of-first-refusal statute and tortious interference with a contract.[83] The trial court ruled as a matter of law that Daniels and the Ricks had wrongfully interfered with Kjesbo's contract with Met Life and ordered specific performance.[84] The Minnesota Court of Appeals reversed, holding that there was an issue of fact as to whether the defendants had originally intended Randy Ricks to own the farm.[85] The Minnesota Supreme Court affirmed the trial court ruling that defendants tortiously interfered with Kjesbo's contract.[86]

To prove wrongful interference with a contract, the plaintiff must prove five elements: existence of a contract, alleged wrongdoer's knowledge of the contract, intentional procurement

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78. *Id.* at 588.

79. *Id.* at 591.

80. *Id.* at 587. In 1988 Met Life acquired title to approximately 320 acres of farmland, taking a deed in lieu of foreclosure from the owner, defendant-respondent Valerie Ricks. *Id.*

81. *Id.*

82. *Id.* At the closing Met Life conveyed title to the 320 acres to Valerie Ricks for $165,000, and Daniels supplied the money. After receiving the deed, Valerie conveyed half of the farmland to her son Randy, who then conveyed his half to Daniels. Valerie kept the remaining half, which was mortgaged to Daniels to secure her promissory note for $85,000. *Id.*

83. *Id.*

84. *Id.* The court also ruled that Kjesbo was entitled to recover attorney fees from Ricks and Daniels. Claims against Metropolitan Life were dismissed because Met Life had given adequate notice to Valerie Ricks of her first refusal rights. *Id.* at 587-88. Ricks and Daniels were also ordered to pay Met Life's attorney fees. *Id.* at 588.

85. *See* Kjesbo v. Ricks 506 N.W.2d 326, 330-31 (Minn. Ct. App. 1993). The court of appeals also ruled that neither Kjesbo nor Met Life were entitled to recover attorney fees from defendants. *Id.* at 331.

86. *Kjesbo*, 517 N.W.2d at 591.

of breach, without justification, and damages.[87] The crucial issue in this case is whether there was justification for procuring a breach of the contract.[88]

In deciding the issue, the Minnesota Supreme Court looked to Minnesota Statutes section 500.24, subdivision 6(n),[89] which prohibits the former owner from selling the farmland to a third party if the sale arrangements were made and agreed to prior to the former owner exercising her right of refusal.[90] The court held that the use of the conduit deed to Randy Ricks as the straw-man was improper and impermissible under the statute.[91] Although the parties used a strawman to technically comply with the statute, the use of a strawman enabled a third party to become an immediate owner of the farm.[92] Such a result was directly contrary to the purpose of the statute.[93] The court reasoned that to allow a right of refusal to be so easily manipulated would frustrate the purpose of the law.[94] Thus, the court affirmed summary judgment in favor of the tortious interference claim.[95]

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87. *Id.* at 588.

88. *Id.*

89. *Id.* Minnesota Statutes § 500.24, subdivision 6(n) (1994) states as follows:

> An immediately preceding former owner, except a former owner who is actively engaged in farming as defined in subdivision 2, paragraph (a), and who agrees to remain actively engaged in farming on a portion of the agricultural land or farm homestead for at least one year after accepting an offer under this subdivision, may not sell agricultural land acquired by accepting an offer under this subdivision if the arrangement of the sale was negotiated or agreed to prior to the former owner accepting the offer under this subdivision. A person who sells property in violation of this paragraph is liable for damages plus reasonable attorney fees to a person who is damaged by a sale in violation of this paragraph. There is a rebuttable presumption that a sale by an immediately preceding former owner is in violation of this paragraph if the sale takes place within 270 days of the former owner accepting the offer under this subdivision. This paragraph does not apply to a sale by an immediately preceding former owner to the owner's spouse, the owner's parents, the owner's sisters and brothers, the owner's spouse's sisters and brothers, or the owner's children.

MINN. STAT. § 500.24, subd. 6(n) (1994).

90. *See id.*

91. *Kjesbo*, 517 N.W.2d at 590-91.

92. *Id.* at 590.

93. *Id.*

94. *Id.*

95. *Id.* at 591.

E. *Owner Has No Duty Where Invitee Participated in Creating Dangerous Condition*

In *Baber v. Dill*,[96] the Minnesota Supreme Court considered whether a landowner has a duty to warn an invitee or make the condition safe where an invitee has assisted in creating an obvious dangerous condition. The court held that a landowner has no such duty.[97]

William Baber sued Mike Dill for negligence in failing to warn or repair a dangerous condition on Dill's property, and for damages resulting from personal injuries sustained.[98] Baber slipped, fell and was impaled on a steel reinforcing rod while constructing a retaining wall on Dill's property.[99] The trial court directed a verdict in Dill's favor, concluding that Baber's actions constituted primary assumption of the risk because he knew and appreciated the danger the rods posed, and that Dill did not owe a duty to protect Baber from a perceivable risk.[100]

The Minnesota Court of Appeals reversed on the grounds that facts were in dispute.[101] The Minnesota Supreme Court, without addressing the issue of whether Baber had primarily assumed the risk of harm that ultimately befell him,[102] held that Dill did not owe a duty to Baber.[103]

First, the court considered whether the landowner has a duty to the invitee. The court stated that the rule of the Restatement (Second) of Torts section 343A applied.[104] Under the Restatement, a possessor of land is not liable for physical

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96. 531 N.W.2d 493 (Minn. 1995).

97. *Id.* at 496.

98. *Id.* at 494-95.

99. *Id.* at 495. At the time of the injury, there were between four to seven reinforcing rods protruding approximately 10 to 14 inches above the wall. *Id.* at 495.

100. *Id.*

101. *Id.* The court of appeals concluded that the issue of assumption of the risk was a question for the jury. The issue of whether Dill had a duty to Baber was not addressed. *Id.*

102. *Id.* The supreme court acknowledged that the doctrine of assumption of the risk was not necessary in this case because before a court could consider assumption of the risk, it first had to determine whether defendant owed a duty to the plaintiff. *Id.*

103. *Id.* at 496. The supreme court relied on Restatement (Second) of Torts § 343A(1) (1965), which reads, "A possessor of land is not liable to his invitee for physical harm caused to them by activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965).

104. *Baber*, 531 N.W.2d 493, 495-96.

harm if the condition is known or obvious, unless the possessor should anticipate the harm despite the obviousness.[105]

Yet this duty is not absolute. The court concluded that a landowner has no duty to an invitee to warn or make safe the condition when the invitee assisted in creating the condition.[106] Thus, the landownner had no duty to warn the invitee. "To hold a landowner has a duty to warn an invitee of danger created, in part, by that individual is untenable."[107]

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105. *Id.*
106. *Id.* at 496.
107. *Id.*